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8 **UNITED STATES DISTRICT COURT**
9 **THE NORTHERN DISTRICT OF CALIFORNIA**
10

Case No. 15-cv-01824-BLF

11 ROBERT HEATH, and
12 CHERYL FILLEKES,
Plaintiffs, on behalf of themselves and
13 others similarly situated,

14 Plaintiffs,

15 v.

16 GOOGLE INC., a Delaware
corporation,

17 Defendant.
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**DANIEL LOW'S NOTICE OF
MOTION AND MOTION TO
WITHDRAW AS COUNSEL OF
RECORD FOR PLAINTIFF
ROBERT HEATH**

Date: May 19, 2016
Time: 9:00 a.m.
Location: Courtroom 3, 5th Floor,
San Jose

Complaint Filed: April 22, 2015
Trial Date: May 1, 2017

**DANIEL LOW'S NOTICE OF MOTION AND MOTION TO WITHDRAW AS
COUNSEL OF RECORD FOR PLAINTIFF ROBERT HEATH**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on May 19, 2016, in Courtroom 3, 5th Floor of the above-titled court, located at 280 South 1st Street, San Jose, California 95113, attorney Daniel Low of Kotchen & Low LLP ("Movant") will, and hereby does, move this Court pursuant to Local Rule 11-5 to withdraw as counsel of record for Plaintiff Robert Heath ("Mr. Heath"). Movant and Mr. Heath have reached a fundamental difference of opinion regarding the prosecution of the case that renders it impossible for Movant to continue its representation of Mr. Heath. Pursuant to Local Rule 11-5(b), Movant consents to accept service on behalf of Mr. Heath, until Mr. Heath appears by other counsel or pro se. Mr. Heath does not consent to Movant's withdrawal. Movant met and conferred with Defendant Google regarding Movant's intention to withdraw as Mr. Heath's counsel, and Google does not oppose Movant's withdrawal. Pursuant to Local Rule 7-1(b), Movant requests that this motion be decided without oral argument.

1 Dated: January 22, 2016

Respectfully submitted,

2 By: /s/ Daniel Low

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11 *Attorney for Plaintiffs*

1 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**
2 **DANIEL LOW’S MOTION TO WITHDRAW AS COUNSEL OF RECORD**
3 **FOR PLAINTIFF ROBERT HEATH**

4 Pursuant to Local Rule 11-5, Daniel Low of Kotchen & Low LLP (“Movant”)
5 hereby moves to withdraw as counsel of record for Plaintiff Robert Heath (“Mr.
6 Heath”). This motion is made on the basis that good cause exists to justify
7 Movant’s permissible withdrawal as counsel in this matter.

9 **STATEMENT OF ISSUES TO BE DECIDED**

10 (1) Whether the Court should grant Movant leave to withdraw as counsel for Mr.
11 Heath, where Movant believes in good faith that it can no longer effectively
12 represent the interests of Mr. Heath in this matter.

14 **STATEMENT OF RELEVANT FACTS**

15 In 2014, Movant and Mr. Heath entered a retainer agreement specifying that
16 Movant would recover fees on a contingency basis. Decl. of M. von Klemperer ¶ 2
17 (Ex. 1). The retainer agreement specifically permits Movant’s withdrawal as counsel,
18 subject to the applicable rules of professional responsibility. *Id.* On April 22, 2015,
19 Movant filed this action on behalf of Mr. Heath, and later filed an amended
20 complaint adding Plaintiff Cheryl Fillekes. (Dkts. ##1, 18). Since that time, a
21 fundamental difference of opinion concerning the prosecution of this case has arisen
22 between Movant and Mr. Heath, rendering it impossible for Movant to effectively
23 and properly represent Mr. Heath in this matter. Decl. of M. von Klemperer ¶ 3.

1 Movant first informed Mr. Heath in mid-December 2015 that it may be necessary for
2 Movant to withdraw as Mr. Heath's counsel in this matter, and that Mr. Heath may
3 need to find alternate counsel. *Id.* ¶ 4. Since that time, Movant and Mr. Heath have
4 conferred numerous times but have been unable to resolve their differences. *Id.* ¶ 5.
5 On January 4, 2016, Movant informed Mr. Heath definitively that it would be
6 withdrawing as Mr. Heath's counsel, and that he must locate alternate counsel or
7 continue pro se. *Id.* ¶ 6. To allow Mr. Heath time to locate alternate counsel, Movant
8 has waited nearly three weeks before filing this motion. Mr. Heath has not yet
9 secured alternate counsel, but he has informed Movant that he is actively seeking
10 representation. *Id.* ¶ 9. Mr. Heath has informed Movant that if he does not secure
11 alternate counsel, he intends to continue pro se. *Id.* Mr. Heath does not consent to
12 this motion. *Id.* ¶ 10.

17 Movant has also provided notice to Plaintiff Cheryl Fillekes and Defendant
18 Google. *Id.* ¶¶ 7-8. Google does not oppose Movant's withdrawal. *Id.* ¶ 8.

20 ARGUMENT

21 Pursuant to Local Rule 11-5(a), "[c]ounsel may not withdraw from an action
22 until relieved by order of Court after written notice has been given reasonably in
23 advance to the client and to all other parties who have appeared in the case." Civil
24 L.R. 11-5(a); *DeLeon v. Wells Fargo Bank, N.A.*, No. 10-CV-01390, 2010 WL
25 3565188, at *1 (N.D. Cal. Sept. 13, 2010). The Court may consider factors such as
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1 the reason for withdrawal, prejudice to the litigants, and possible delay to
2 resolution of the case. *Id.* Withdrawal of counsel is governed by “the standards of
3 professional conduct required of members of the State Bar of California.” *Id.*
4 (citing Civil L.R. 11-4(a)(1)). Pursuant to Rule 3-700(C) of the California Rules of
5 Professional Conduct counsel may withdraw where:
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8 (1) The client

9 (a) insists upon presenting a claim or defense that is not warranted under
10 existing law and cannot be supported by good faith argument for an extension,
11 modification, or reversal of existing law, or

12 (b) seeks to pursue an illegal course of conduct, or

13 (c) insists that the member pursue a course of conduct that is illegal or that is
14 prohibited under these rules or the State Bar Act, or

15 (d) by other conduct renders it unreasonably difficult for the member to carry
16 out the employment effectively, or

17 (e) insists, in a matter not pending before a tribunal, that the member engage in
18 conduct that is contrary to the judgment and advice of the member but not
19 prohibited under these rules or the State Bar Act, or

(f) breaches an agreement or obligation to the member as to expenses or fees.

20 (2) The continued employment is likely to result in a violation of these rules or of
21 the State Bar Act; or

22 (3) The inability to work with co-counsel indicates that the best interests of the
23 client likely will be served by withdrawal; or

24 (4) The member’s mental or physical condition renders it difficult for the member
25 to carry out the employment effectively; or

26 (5) The client knowingly and freely assents to termination of the employment; or

27 (6) The member believes in good faith, in a proceeding pending before a tribunal,
28 that the tribunal will find the existence of other good cause for withdrawal.

1 Cal. R. Prof. Conduct 3-700(C).

2 Movant has provided Mr. Heath and all other parties reasonable notice of its
3 intention to withdraw as Mr. Heath's counsel, and Movant's withdrawal will not
4 cause any party significant prejudice, or delay the resolution of the case. On the
5 other hand, because Movant is prosecuting this action on a contingency basis, not
6 permitting withdrawal would cause Movant significant prejudice. Movant and Mr.
7 Heath have reached a fundamental difference of opinion concerning the
8 prosecution of this case, and Movant believes in good faith that one or more of the
9 Rule 3-700(C) factors make it impossible for counsel to effectively represent Mr.
10 Heath in this matter. However, the precise nature of that dispute is subject to
11 attorney-client privilege. Should the Court require further elaboration, Movant
12 respectfully requests permission to appear *in camera* before the Court, or in the
13 alternative, to file an affidavit under seal to protect client confidences and avoid
14 prejudice to Mr. Heath.
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20 CONCLUSION

21 For the foregoing reasons, Movant respectfully requests that the Court grant
22 this Motion and enter the proposed order permitting Movant's withdrawal as counsel
23 of record for Mr. Heath. Pursuant to Local Rule 11-5(b), Movant consents to accept
24 service on behalf of Mr. Heath until the time Mr. Heath appears by alternate counsel
25 or pro se.
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2 Dated: January 22, 2016

Respectfully submitted,

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4 By: /s/ Daniel Low

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